86-993 (1)

No. _____

In the Supreme Court of the United States

OCTOBER TERM 1986

RICHARD C. COX
PETITIONER

v.

CHARLES NORTON,
DIRECTOR OF TAX COLLECTION
OF THE LEXINGTON-FAYETTE URBAN
COUNTY GOVERNMENT AND
LEXINGTON-FAYETTE URBAN COUNTY GOVERNMENT
RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT AND APPENDIX

WILLIAM C. JACOBS
173 North Limestone Street
Lexington, Kentucky 40508
(606) 254-9086

Attorney for Petitioner

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a. QUESTIONS PRESENTED FOR REVIEW

This is a §1983 action seeking to void a special tax assessment levied on Petitioner Cox's real property, without first affording him a hearing on the assessment.[1] In a prior state (Kentucky) court action, Cox unsuccessfully challenged the constitutionality of a statute describing the public hearing, held when levy of an assessment was not a certainty, and actual assessment amounts were yet unknown. After entry of the Kentucky judgment, the tax was calculated and levied without a hearing, and this suit was filed. The Court below affirmed dismissal, on *res judicata* grounds, without relying on Kentucky's law of preclusion, holding only that the issue here was "fairly encompassed and resolved by the prior litigation." Kentucky does not give its judgments preclusive effect unless, inter alia, there is an identity of causes of action, and the claim in the second action ripened before the former action was commenced.

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[1] *Londoner* v. *Denver,* 210 U.S. 373 (1907) at 385-386 held that ". . . where the legislature of a state, instead of fixing the tax itself, commits to some subordinate body the duty of determining whether, in what amount, and upon whom it shall be levied, and of making its assessment and apportionment, due process of law requires that, at some stage of the proceedings, before the tax becomes irrevocably fixed, the taxpayer shall have an opportunity to be heard, of which he must have notice, either personal, by publication, or by a law fixing the time and place of the hearing."

The questions presented are:

1) Whether 28 U.S.C. §1738 requires the Court of Appeals to analyze and apply Kentucky's law of preclusion before dismissal of Cox's §1983 action may be upheld?

2) Whether the Court of Appeals gave the prior Kentucky judgment greater preclusive effect than would the courts of Kentucky?

b. PARTIES

The caption of the case in this Court contains the names of all parties.

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d. OPINIONS BELOW

On July 31, 1986, in Appeal No. 85-5773, the United States Court of Appeals for the Sixth Circuit rendered its reported Opinion, affirming the trial court which had dismissed Petitioner's action under 42 U.S.C. §1983 as being barred by the doctrine of *res judicata*. That Opinion, 797 F.2d 329 (1986), appears as Appendix A hereto. The United States District Court for the Eastern District of Kentucky rendered its unreported MEMORANDUM, OPINION AND ORDER on June 18, 1985, and its unreported opinion and ORDER on July 23, 1985, and the same appear as Appendix B-1 and B-2 hereto, respectively. On September 17, 1986, the United States Court of Appeals for the Sixth Circuit denied Petitioner's timely filed petition for rehearing, and appears as Appendix D hereto.

e. JURISDICTION

i. The opinion of the Court of Appeals sought to be reviewed was rendered on July 31, 1986.

ii. The Petitioner's timely petition for rehearing was denied by Order filed September 17, 1986.

iii. No cross-petition for writ of certiorari has been filed.

iv. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

f. CONSTITUTIONAL AND STATUTORY PROVISIONS

CONSTITUTIONAL PROVISIONS

The Fourteenth Amendment to the U.S. Constitution, §1 provides, in pertinent part:

> . . . nor shall any state deprive any person of . . . property, without due process of law . . . .

STATUTORY PROVISIONS

28 U.S.C. §1738 provides, in pertinent part:

> . . . judicial proceedings . . . shall have the same full faith and credit in every court within the United States . . . as they have by law or usage in the courts of such State . . . from which they are taken.

42 U.S.C. §1983 provides, in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceedings for redress. . . . .

KRS 67A.875(6) provides:

The ordinance of initiation shall provide that a public hearing shall be held in respect of the proposed project at a time and place which shall be specified in the ordinance of initiation, and shall give notice that at the public hearing any owner of benefited property may appear and be heard as to whether the proposed project should be altered, and whether the project shall be financed through the assessment of benefited properties and issuance of bonds in respect of assessments not paid on a lump sum basis, all as proposed by the ordinance of initiation and as authorized by KRS 67A.871 to 67A.894.

KRS 67A.875(4) provides:

In all succeeding proceedings, the government shall be bound and limited by the ordinance of initiation with regard to the nature, scope and extent of the proposed wastewater collection project, but shall not be bound by or limited to the preliminary estimate of the costs of the proposed project. The costs of such project shall be determined upon the basis of construction bids publicly solicited by such urban-county government as required by KRS 67A.871 to 67A.894, and shall be binding upon the government and upon the owners of benefited properties, whether they turn out to be equal to, below, or above, such preliminary estimate of costs.

g. STATEMENT OF THE CASE

On January 10, 1980, the Respondent Government determined that there was a need to construct a sanitary sewer project pursuant to KRS 67A.871 - .894 (the Act) to serve numerous parcels of real estate, including that of the Petitioner (Cox). Under the Act, if the Government ultimately decided to undertake the project, the costs of construction pass through to the benefited properties by levy of a special tax assessment and lien on the properties.

On March 31, 1980, before it was determined whether the project would be undertaken, the public hearing described by KRS 67A.875(6) (quoted above), was held in the manner described, i.e., without affording a hearing on the assessment itself. Estimated assessments, however, were furnished at the hearing.

Thereafter, the Government passed the Ordinance which under the Act commenced the running of a 30-day permissive litigation period. Under the Act, calculation of the actual amount of Cox's special tax assessment (and others in the project area) awaited expiration of the litigation period, or termination, in a manner favorable to the project, of any litigation filed during the litigation period. Under KRS 67A.875(4) (quoted above), if the actual assessment, calculated after the solicitation of construction bids, differed from the estimate furnished at the hearing, the actual assessment controlled.

During the litigation period, Cox and others filed the prior action, challenging the legality of the preliminary steps of the proposed project on numerous state and federal grounds. One of those grounds, the one upon which the Respondents base their *res judicata* defense, may be stated, as follows: whether KRS 67A.875(6) violated the Due Process Clause as not allowing property owners to be heard on their respective assessment amounts, and because the hearing was held at a time when the actual assessment amount was not yet known?

On August 31, 1983, the Kentucky Supreme Court in *Conrad* v. *Lexington-Fayette Urban County Government,* Ky., 659 S.W.2d 190 (1983) affirming dismissal, dealt with this issue in the first three (3) full paragraphs, at page 197 of its Opinion. The Court held, in the first paragraph, that the Constitution did not require the public hearing to be a "trial-type" hearing, began the second paragraph with the *Mathews* v. *Eldridge,* 424 U.S. 319 (1976) "opportunity to be heard at a meaningful time and manner" definition of a Due Process hearing, and concluded the second paragraph by citing *Shaw* v. *City of Mayfield,* 204 Ky. 618, 265 S.W. 13 (1924) which relies on *Londoner* v. *Denver,* 210 U.S. 373 (1907), and holds that if the property owner is not afforded a "trial-type" hearing on the assessment itself, before the liability of his property is fixed, the assessment made by the Government may not be enforced. The third paragraph decided an issue which no one had raised.

Since the public hearing had been held at a time when no deprivation of property had occurred, or inevitably would occur, the Kentucky Court did not decide, whether Cox's Due Process rights might thereafter be violated. With *Shaw* v. *City of Mayfield,* supra, however, the Court spelled out what the Due Process Clause required, if assessments were thereafter imposed.

The litigation thus concluded, the Government decided to proceed. It calculated Cox's assessment, notified him in October, 1983, of its amount, and told him that if he did not pay the assessment in lump sum by October 31, 1983, his real property would become subject to an assessment lien for annual installments over a 20-year period. No hearing of any kind was authorized or permitted. Cox declined to pay by lump sum, thus, subjecting his property to the 20-year annual assessment lien.

Contemporaneous with the events of the preceding paragraph, by appeal, from *Conrad* v. *Lexington-Fayette Urban County Government,* supra, Cox sought to have KRS 67A.875(6) declared unconstitutional. In *Cox* v. *Lexington-Fayette Urban County Government,* 466 U.S. 919 (1984), the appeal was dismissed.

On December 11, 1984, Cox commenced this action under 42 U.S.C. §1983 claiming, that under color of state law, he was deprived of property without due process of law, by the Government's imposition of the sewer tax assessment and lien upon his real property

without affording him a hearing on the assessment itself.[2]

Respondents contended that the decisions of the Kentucky Supreme Court, in *Conrad,* supra, and this Court, in *Cox,* supra, upholding the constitutionality of KRS 67A.875(6), precluded Cox from asserting that the post-litigation levy of the assessment and lien on his real property deprived him of property without due process of law.

Cox contended that there was no identity of causes of action between this and the prior action, that his §1983 claim had not ripened before the prior action was commenced (two elements of Kentucky's law of preclusion), and that *Conrad,* supra, could only be given the same preclusive effect as *Conrad* would be given by the courts of Kentucky. The trial court, by a limited application of a portion of Kentucky's law of preclusion, sustained Respondents' *res judicata* defense, and dismissed the action.

On appeal, Cox relied on *Migra* v. *Warren City School District Board of Education,* 465 U.S. 75 (1984)

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[2]*Londoner* v. *Denver,* 210 U.S. 373 at 378 holds "The proceedings from the beginning up to and including the passage of the ordinance authorizing the work, did not include any assessment or necessitate any assessment, although they laid the foundation for an assessment, which might or might not subsequently be made. Clearly all this might validly be done without hearing to the landowners, provided a hearing upon the assessment itself is afforded."

and *Haring* v. *Prosise,* 462 U.S. 306 (1983), and the two (2) cases which best characterize Kentucky's law of preclusion, *Newman* v. *Newman,* Ky., 451 S.W.2d 417 (1970) and *Hays* v. *Sturgill,* 302 Ky. 31, 193 S.W.2d 648 (1946), contending that Kentucky law did not bar his §1983 action.

The Court of Appeals did not rely on or apply Kentucky's law of preclusion, but concluded only that the issue raised in this action was "fairly encompassed and resolved by the prior litigation," Slip Op. 5.

The basis for federal jurisdiction in the court of first instance is 28 U.S.C. §1343(3) and (4).

j. REASONS FOR GRANTING THE WRIT

By holding that the judgment in the prior Kentucky action bars this §1983 action, without applying Kentucky's law of preclusion, the Sixth Circuit's Opinion conflicts with decisions of this Court interpreting and applying 28 U.S.C. §1738.

The federal question of whether a §1983 action filed in federal court is barred by a prior state court judgment has consistently been held by this court to be inextricably tied to the judgment-state's law of preclusion, because 28 U.S.C. §1738 requires it. This court has repeatedly held that by §1738, Congress has specifically required all federal courts to give the same preclusive effect to a state court judgment that the courts of the state from which the judgment emerged would give it.

In a §1983 action, seeking damages for an alleged Fourth Amendment violation, *Allen* v. *McCurry,* 449 U.S. 90 (1980), it was held that a Missouri court's earlier denial, in a criminal proceeding, of the §1983 Plaintiff's Fourth Amendment motion to suppress evidence, could be asserted as a collateral estoppel defense by the §1983 Defendant. Relying on §1738, this Court held, however, that the state judicial proceeding must be given the same full faith and credit by the federal court that Missouri's courts would give it. Because the lower court had held preclusion inapplicable to the §1983 action, the case was remanded for proceedings consistent with the opinion.

In *Haring* v. *Prosise,* supra, this court held that a §1983 action for damages for an alleged Fourth Amendment violation, was not barred by Virginia's law of preclusion, where the Plaintiff's state court guilty plea was accepted before any ruling had been made on his Fourth Amendment suppression of evidence motion. Pursuant to §1738, in *Haring,* at 314-316, this Court undertook a detailed analysis of Virginia's preclusion law, and concluded that Virginia court's would not give the guilty plea preclusive effect so as to bar the §1983 action.

Migra v. *Warren City School District Board of Education,* supra, held that §1738 required the federal court to give prior state court (Ohio) breach of contract judgment of a §1983 plaintiff the same preclusive effect that judgment would be given in Ohio courts. Having

concluded that it was unclear whether the District Court was applying Ohio's law of preclusion, the case was remanded to the Court of Appeals to instruct the District Court to conduct such further proceedings as this Court's opinion required.

With *Marrese* v. *American Academy of Orthopaedic Surgeons,* 470 U.S. _____, 84 L.Ed.2d 274 (1985), and *Parsons Steel, Inc.*v. *First Alabama Bank,* 474 U.S. _____, 88 L.Ed.2d 877 (1986), two (2) cases not involving §1983, this Court underscored its insistence on strict adherence to §1738.

Marrese, supra, held that under §1738 it was error to determine the preclusive effect of a state court judgment upon a subsequent federal antitrust suit, without considering the judgment-state's preclusion law, despite the fact that federal antitrust claims are within the exclusive jurisdiction of federal courts. This Court was unwilling to create a special exception to §1738 for federal antitrust claims that would give state court judgments greater preclusive effect than would the courts of the state rendering the judgment.

Parsons Steel, supra, held that §1738 barred a federal court from enjoining a state action to protect a prior federal judgment where the state court had theretofore ruled that *res judicata* did not bar the action before it.

What this court said in *Parsons Steel,* at 88 L.Ed.2d 877, 883, can be said of the Opinion below, i.e., it "gave

unwarrantedly short shrift to the important values of federalism and comity embodied in the Full Faith and Credit Act" by declining to analyze and apply, or even acknowledge, Kentucky's law of preclusion.

In *Newman* v. *Newman,* supra, the Kentucky court held that an adverse possession action was not barred by a previous action wherein the Plaintiff had unsuccessfully claimed title to the subject real property under a deed. It further held that Kentucky's rule of *res judicata* acts as no bar to an action unless there is an identity of parties, identity of the two causes of action and the prior action was decided on its merits. Further, the court held that the issues presented in the adverse possession action were not germane in the previous action to determine the validity of a deed, and further that the adverse possession claim need not have been presented in the former action since it had not ripened when the former action was commenced, notwithstanding the fact that the claim did ripen before final judgment was entered in the previous action.

Kentucky's law of preclusion is in full accord with *Moses Lake Homes, Inc.* v. *Grant County,* 365 U.S. 744 (1961). *Moses Lake Homes* held that a state court judgment permitting the levying of taxes on certain leasehold estates was not *res judicata* to the county's tax claims against those leaseholds so as to preclude lessees from claiming later in federal court that the taxes were invalid because they discriminated against a lessee of the federal government. According to this

Court, in *Moses Lake Homes,* at the time of the state court judgment, no tax had been assessed or levied against the leaseholds. Therefore, this Court held, the issue of discrimination was not, and could not have been, presented or adjudicated in the state court action. So it is with Cox: at the time of the Kentucky court judgment, no tax had been assessed or levied against his property. Therefore, the issue of whether Cox had been deprived of property without due process was not, and could not have been, presented or adjudicated in the prior Kentucky action.

Newman, supra, relied on *Hays* v. *Sturgill,* supra. *Hays* exemplifies the narrowness of Kentucky's law of preclusion and holds that an action to nullify a deed did not bar a second action to construe the same deed. At 193 S.W.2d 650 *Hays* held:

> The *res judicata* rule does not mean that the prior judgment is conclusive of matters which were 'not germane to, implied in or essentially connected with the actual issues in the case although they may affect the ultimate rights of the parties and might have been presented in the former action.'

The relief sought in the prior Kentucky action, here, was to enjoin the Government from proceeding with the project, based on claimed irregularities occurring prior to the commencement of the state action. The relief sought here involves claimed unconstitutional conduct which occurred after the conclusion of

the former action—conduct which was not certain to occur after the Kentucky action was concluded.

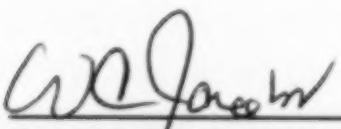
Hays pointed out, at 650, that the "best test" in Kentucky for the application of the *res adjudicata* rule is whether the evidence was not, and could not be, the same in each action. Cox could not have presented evidence in the former action of the assessment of which he complains because levy of it did not occur until after judgment in that action.

Under Kentucky's law of preclusion, the prior action would be no bar to Cox's §1983 action. §1738 requires the lower court to apply Kentucky law. On its face, the opinion below decided this substantial federal question in a way which conflicts with *McCurry, Haring, Migra, Marrese* and *Parsons Steel,* i.e., it gave the prior Kentucky judgment greater preclusive effect to Cox's §1983 action that Kentucky courts would have given it, and contrary to this court's decisions interpreting §1738.

CONCLUSION

WHEREFORE, Petitioner respectively prays that his petition for writ of certiorari to review the decision of the U.S. Court of Appeals for the Sixth Circuit be granted, with further proceedings pursuant to the Rules and further orders of this Court.

Respectfully submitted,



WILLIAM C. JACOBS
173 North Limestone Street
Lexington, Kentucky 40507
(606) 254-9086

Attorney for Petitioner

APPENDIX

APPENDIX A

RECOMMENDED FOR FULL TEXT PUBLICATION
See, Sixth Circuit Rule 24

No. 85-5773

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

RICHARD C. COX, *Plaintiff-Appellant,*

v.

CHARLES NORTON, DIRECTOR OF DIVISION OF TAX COLLECTION OF THE LEXINGTON-FAYETTE URBAN COUNTY GOVERNMENT,

Defendants-Appellees.

Decided and Filed July 31, 1986

Before: MARTIN, KRUPANSKY and GUY, Circuit Judges.

GUY, Circuit Judge. Plaintiff Cox filed a 42 U.S.C. § 1983 action against the defendants seeking to permanently enjoin the collection of a special assessment levied against property owned by him to pay for the cost of installing sanitary sewers. Cox claimed he had been denied due process by not being afforded a hearing in which he could challenge the amount of his special assessment. Defendants moved for summary judgment relying on the doctrine of res judicata and claiming that Cox had previously litigated this same issue and

had received an adverse determination. The district court found that Cox's earlier state court action, which was appealed to the United States Supreme Court, did result in a determination which precluded Cox from further litigating the issue of the due process hearing. We reach the same conclusion and affirm.

I.

Pursuant to a Kentucky statute, "voters in any county . . . may merge all units of city and county government into an urban-county form of government." Ky. Rev Stat. § 67A.010. One of the primary purposes of such a merger is to prevent duplication of services and, accordingly, such units are empowered to undertake certain public works projects, including sanitary improvements. The defendant, Lexington-Fayette Urban County Government, was duly constituted as an urban-county unit and undertook a waste water collection project. This project was to be financed by a bond issue initially, and the bonds were to be paid off from proceeds received by specially assessing the properties determined to benefit from the installation of sanitary sewers. The State of Kentucky has enacted a detailed statutory procedure for the construction of such projects and the issuing of bonds in connection therewith. Ky. Rev. Stat. §§67A.871-67A.894. Included within these procedures is the requirement that a hearing be held after notification to all benefited property owners.

Notice of public hearing

The urban-county government shall cause notice of the public hearing ordered to be held by the ordinance of initiation to be afforded to all owners of property proposed to be benefited by the project and to be assessed for the costs thereof. The notice shall be published pursuant to KRS Chapter 424, and in addition, such reasonable actual notice as is best suited to advise affected benefited property owners shall be given to owners of the benefited property using such methods as shall be determined by ordinance of the urban-county government to be the most practicable in the circumstances. The notice shall advise owners of benefited property that a public hearing shall be held in respect of the project and its financing, and that assessments to pay the costs of the project are proposed to be levied against all benefited properties.

Ky. Rev. Stat. Ann § 67A.876.

Cox, as a benefited property owner within the proposed assessment district, received notice of a hearing which was held on March 31, 1980. The purpose of such a hearing is to afford an opportunity to the "owner of property proposed to be benefited by the proposed wastewater collection project [to] appear and be heard" either advocating or objecting to such proposed project. Ky. Rev. Stat. Ann. § 67A.878. Cox, along with other property owners, appeared and objected. After such a hearing is held the urban-county council must meet

and consider any objections raised at the hearing in deciding whether or not to go ahead with the project. Such a meeting was held and on May 29, 1980, the council passed an "ordinance of determination" after deciding to proceed with the project. Ky. Rev. Stat. Ann. § 67A.879.

On June 3, 1980, Cox and others filed suit in the state court challenging the legality of the proposed project on state and federal grounds. The property owners lost this suit and appealed through the state court system to the Kentucky Supreme Court. On August 31, 1983, the Kentucky Supreme Court affirmed the trial court. *Conrad* v. *Lexington-Fayette Urban County Government,* 659 S.W.2d 190 (Ky. 1983). Cox then further appealed to the United States Supreme Court which ultimately dismissed the case on April 2, 1984. *Appeal dismissed mem., sub nom. Cox* v. *Lexington-Fayette Urban-County Government,* 466 U.S. 919 (1984). On December 11, 1984, Cox instituted the present action in district court subsequent to his first annual assessment installment of $317.42 becoming due. Although the original state court action *(Conrad)* challenged many procedural aspects of the sewer project, in the present action the only issue raised is the failure of the defendants to afford Cox a second hearing after the *specific amount* of his assessment became known.

II.

The issue presented on appeal is a narrow one and no material facts are disputed. Furthermore, the parties do not disagree on the basic law of res judicata to be applied to this fact situation. It is conceded that a federal court must give a state court judgment the same preclusive effect as that judgment would be given under the law of the state in which the judgment was rendered. *Allen* v. *McCurry,* 449 U.S. 90 (1980); *Haring* v *Prosise,* 462 U.S. 306 (1983); and *Migra* v. *Warren City School District Board of Education,* 465 U.S. 75 (1984). Cox concedes that he had a full and fair opportunity to object to the project both in the statutory hearing and the subsequent court action but never was afforded the opportunity to challenge the specific amount of his assessment since that *specific* amount was not known at the time of the hearing or when the state court action was pending. Cox thus argues that the prior court action could not have preclusive effect since the specific amount of his assessment was not involved. Cox does not content that the *statute* requires more than one hearing but, rather, that case law superimposes upon the statute the requirement of a second hearing.[1] Cox does not contest that he could not prevail here if the state court litigation did in fact resolve the issue he now raises or if there is no require-

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[1]Cox relies primarily on *Londoner* v. *Denver,* 210 U.S. 373 (1907), and *Moses Lake Homes, Inc.* v. *Grant County,* 365 U.S. 744, *reh'g denied,* 366 U.S. 947 (1961). *See* n.3, *infra.*

ment for a second hearing mandated by principles of due process. Since we conclude as did Judge Wilhoit that the issue now raised by Cox was fairly encompassed and resolved by the prior litigation, we are precluded from separate and independent consideration of the issue of just how many hearings due process requires under these circumstances.

Kentucky Revised Statutes Annotated § 67A.875(6) provides that at the required public hearing:

> [A]ny owner of benefited property may appear and be heard as to whether the proposed project should be undertaken, whether the nature and scope of the project should be altered, and whether the project shall be financed through the assessment of benefited properties and issuance of bonds in respect of assessments not paid on a lump sum basis, all as proposed by the ordinance of initiation and as authorized by KRS 67A.871 to 67A.894.

At the hearing which was held, although the precise dollar amount of each property owner's assessment was not then known, there were estimates available. Cox has not argued that these estimates were unreliable. Additionally, in the prior civil action one of the grounds for attacking the Kentucky statute was the fact that hearings were held before costs were finally determined and before precise assessment amounts could be known. Cox attempts to argue around

those facts, however, by claiming that although the courts have already ruled that the hearing that was held passed due process muster, this does not mean there is still not a second hearing required. This argument misperceives the totality of the Kentucky regulatory scheme as it relates to this type of public works project where a bond issue is contemplated.

Under the Kentucky statute there is a 30-day period allowed to institute litigation after the "ordinance of determination" is adopted by the council. The primary purpose of such a short statute of limitations is to be able to determine if there is going to be litigation and if so to resolve it expeditiously since pending litigation is usually fatal to the issuance or marketing of bonds. The urban-county does not know the amount of bonds it is even going to have to issue until it finds out how many of those specially assessed intend to pay in a lump sum. The bonds are issued only to cover the installments payments. If, as plaintiff suggests, due process requires that a hearing be held at this point in time, one would never know when or whether the bonds could be safely issued.[2]

Due process does not require a perfect hearing but, rather, that there be provided an orderly process whereby persons situated such as Cox can object to the

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[2]The statute addresses a statute of limitations running for 30 days from passage of the ordinance of determination. Plaintiff does not suggest here what further time period is to be allowed to bring suit if a second hearing were held as he suggests.

project, the estimated cost of the project, the method of financing the project, the estimated cost of the project, the method of financing the project, and the general amount of such assessments. This type of hearing was not only provided to Cox but more significantly for our purposes he has already unsuccessfully challenged this hearing process all the way to the United States Supreme Court. Plaintiff has had his day in court and the determinations made are res judicata of the claims here.[3]

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[3]Plaintiff's heavy reliance on *Moses Lake Homes, Inc.* v. *Grant County* is totally misplaced. *Moses* involved real property taxes being assessed against a leasehold by a local unit of government. The mere placing of this property on the tax rolls was challenged since the Federal government was the *owner* of the leased land. At almost the same time this litigation was instituted, Congress passed legislation specifically making such leasehold interests taxable. When the county then began levying taxes, it did so admittedly upon a valuation computed on a different basis than if the lands had been state owned. The same congressional legislation which made these Federal lands taxable provided, however, that the taxes could not exceed those imposed on similar property of similar value. When the matter was before the Ninth Circuit, that court sent the case back to the district court to correctly compute the taxes. The Supreme Court reversed this remand and held the tax void and not capable of recomputation. The county then tried to argue that the Washington Supreme Court had earlier ruled these lands taxable and this holding should be res judicata. The Supreme Court rejected this argument and held that the decision of the Washington Supreme Court that the lands are taxable was not at issue in the case at bar and that the Washington Supreme Court had never had before it nor considered the issue of a discriminatory tax and assessment specifically pro-

(continued on page 9a)

AFFIRMED.

(footnote 3, continued from page 8a)

hibited by Congress. Under those circumstances, there obviously was no res judicata effect as to the precise issues before the Court in *Moses*. This situation is totally inapposite factually from the case at bar.

Similarly, we find *Londoner* v. *Denver* to be of no help to plaintiff's claims. In *Londoner,* the Supreme Court ruled that where a *hearing* was required before assessments on taxes could become "irrevocably fixed," merely providing an opportunity to *file* written objections did not satisfy due process. *Londoner* teaches nothing about when a hearing must be held. Here, plaintiff was afforded a public hearing which comports with the holding in *Londoner*.

* * * * * * *

APPENDIX B-1

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
LEXINGTON

CIVIL ACTION NO. 84-422

RICHARD C. COX PLAINTIFF

VS. **MEMORANDUM OPINION AND ORDER**

CHARLES NORTON, ET AL. DEFENDANTS

The plaintiff brought this action challenging the defendants' right to construct a sewer project and impose an improvement assessment. The defendants have moved for summary judgment, arguing that the matter has been previously litigated.

The plaintiff is one of several landowners who previously litigated the constitutionality of KRS 67A.871 through 67A. 894, the statutes authorizing the construction of this type of project. The Fayette Circuit Court upheld the statute and ruled in favor of the Lexington-Fayette Urban County Government, as did the Kentucky Supreme Court. *Conrad* v. *Lexington-Fayette Urban County Government,* 659 S.W.2d 190 (Ky. 1983). The matter was taken to the United States

Supreme Court, which dismissed the plaintiffs' appeal. *Conrad, supra, dismissed sub nom. Cox* v. *Lexington-Fayette Urban County Government,* 104 S.Ct. 1698 (1984).

Count III of the *Conrad* complaint challenges the right of the defendants to impose the improvement assessment without conducting a full hearing. This is exactly the charge the plaintiff brings in this action.

The Kentucky Supreme Court found that the hearings conducted by the defendants met the requirements of due process. *Conrad,* 659 S.W.2d at 197. Since there exists an identity of parties and causes of action between this action and the former action, the matter is *res judicata. Newman* v. *Newman,* 451 S.W.2d 417 (Ky. 1970).

In any event, this Court is bound by the U.S. Supreme Court's dismissal of the *Conrad* action as a finding that there was no significant federal question involved. *Hicks* v. *Miranda,* 422 U.S. 332 (1975).

Accordingly,

IT IS ORDERED:

(1) That the defendants' motion for summary judgment is GRANTED.

(2) That the plaintiff's motion for summary judgment is DENIED.

A judgment in conformity herewith shall be entered this 17 day of June, 1985.

/s/ Henry R. Wilhoit, Jr.
HENRY R. WILHOIT, JR., Judge

* * * * * * * *

APPENDIX B-2

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
LEXINGTON

CIVIL ACTION NO. 84-422

RICHARD C. COX PLAINTIFF

VS. **ORDER**

CHARLES NORTON, ET AL. DEFENDANTS

This matter is before the Court on the plaintiff's motion to alter or amend this Court's judgment entered on June 18, 1985.

After reviewing the record and the cases cited by the parties, the opinion of this Court is unchanged. This case is easily distinguishable from *Moses Lake Homes, Inc.* v. *Grant County,* 365 U.S. 744 (1961). In this case, unlike *Moses Homes,* the very issue that the forms the basis of the plaintiff's action was in fact adjudicated in a prior state action, Having been so adjudicated, the matter is *res judicata.*

Accordingly,

IT IS ORDERED that the plaintiff's motion to alter or amend judgment is DENIED.

On this 22 day of July, 1985.

/s/ Henry R. Wilhoit, Jr.
HENRY R. WILHOIT, JR., Judge

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APPENDIX C

FILED
JULY 31 1986
JOHN P. HEHMAN, Clerk

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 85-5773

RICHARD C. COX, Plaintiff-Appellant,

v.

CHARLES NORTON, et al., Defendants-Appellees.

JUDGMENT

ON APPEAL from the United States District Court for the Eastern District of Kentucky.

THIS CAUSE came on to be heard on the record from the said District Court and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this court that the judgment of the said District Court in this case be and the same is hereby affirmed.

It is further ordered that Defendants-Appellees recover from Plaintiff-Appellant the costs on appeal, as itemized below, and that execution therefor issue out of said District Court, if necessary.

ENTERED BY ORDER OF THE COURT

John P. Hehman, Clerk

/s/ John P. Hehman
Clerk

A True Copy.

Attest:

/s/ Michele P. Man
Deputy Clerk

Issued as Mandate: 9/25/86

COSTS: none

Filing fees ..... $
Printing ..... $
Total ..... $

* * * * * * *

APPENDIX D

FILED
SEP 17 1986
JOHN P. HEHMAN, Clerk

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

RICHARD C. COX, Plaintiff-Appellant,

v. **ORDER DENYING PETITION FOR REHEARING.**

CHARLES NORTON, et al., Defendants-Appellees.

BEFORE: MARTIN, KRUPANSKY and GUY, Circuit Judges.

Upon consideration of the petition for rehearing, the panel concludes that it is without merit.

Accordingly, the petition for rehearing is DENIED.

ENTERED BY ORDER OF THE COURT

/s/ John P. Hehman
Clerk

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